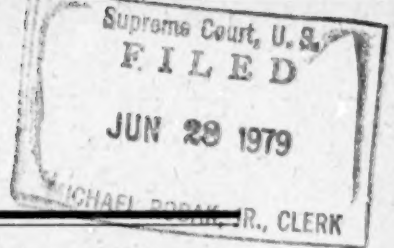


No. 78-1501



In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES JEFFERSON McLAIN, ET AL., PETITIONERS

v.

REAL ESTATE BOARD OF NEW ORLEANS, INC., ET AL.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

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QUESTION PRESENTED

Whether the real estate brokerage business is outside the reach of the Sherman Act.

INTEREST OF THE UNITED STATES

The United States is principally responsible for the enforcement of the Sherman Act, 15 U.S.C. 1 and 2. The question presented by this case will have an effect on that enforcement responsibility. For example, in a criminal case brought by the United States a question concerning the extent to which brokerage activities involve interstate commerce arose and was resolved in favor of the coverage of the Act. See *United States v. Foley*, Nos. 78-5013 to 78-5019 (4th Cir. Apr. 19, 1979), pets. for cert. pending, Nos. 78-1737 and 78-1838.

The United States also administers programs to insure home mortgages, and it regulates the lending institutions that make mortgage loans. These programs may be affected by anticompetitive activity of real estate brokers. Moreover, Section 806 of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3606, prohibits discrimination by brokers in the showing and sale of homes. The constitutionality of this statute, to the extent it rests on Congress' power to regulate interstate commerce, could be affected by the Court's decision in this case.

STATEMENT

Petitioners have bought or sold houses in the greater New Orleans area through the services of respondent real estate brokers. Petitioners seek to represent the class of house buyers and sellers. They contend that respondents conspired to fix, raise and stabilize the price of their brokerage services and to inflate the price of real estate (Pet. App. 9a-11a).¹ The district court never addressed either the merits of the complaint or the question of class certification. It instead dismissed the complaint because, in its view, the activities of the brokers do not occur in or affect interstate commerce (Pet. App. 17a-23a).

Petitioners' complaint alleged that respondents assist purchasers and sellers "of thousands of parcels of real estate in [the] Greater New Orleans [area] each year;" that many persons use respondents' services in "moving into and out of the Greater New Orleans area;" and that respondents help their clients secure financing and insurance, much of which is "obtained from sources outside the State of Louisiana and moves into interstate

¹Petitioners also seek to have a class of brokers certified as defendants (Pet. App. 7a-8a).

commerce into the State of Louisiana through the activities of the defendants" (Pet. App. 8a-9a). The district court held that these allegations, even if proven, would not establish that respondents' activities have an effect on commerce. The court rejected as a matter of law petitioners' assertion that the movement of respondents' clients across state lines establishes that the Sherman Act applies to respondents (Pet. App. 18a n.2).² The court reasoned (*id.* at 18a) that an effect on commerce could be found only if respondents' role in securing financing and title insurance for their clients was just like the role of lawyers, which was examined in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). On the basis of discovery directed to the brokers' role in securing home financing and title insurance for their clients, the court held that their assistance is "incidental" rather than "integral" to the financing process and therefore insufficient to show an effect on commerce (Pet. App. 20a-23a).

²Petitioners offered to prove that brokers "routinely and consistently do business with one or more parties located outside the State of Louisiana" (R. 163), that respondents "actively solicit the business of out-of-state buyers and sellers" (*ibid.*), that such solicitation is partially accomplished by membership in national relocation services headquartered outside the state (*ibid.*), and that interstate channels of communication are used in the course of soliciting and servicing both local and out-of-state clients (R. 163-164). ("R." refers to the record in the court of appeals.) The district court's ruling prevented further discovery on these issues (Pet. App. 17a-18a).

The court also disregarded respondents' fee-sharing arrangements with out-of-state brokers, finding them irrelevant to a charge of local price-fixing (Pet. App. 19a n.3).

The court of appeals affirmed, holding that real estate brokerage is "entirely local in character" and that "[r]eal property is itself the quintessential local product" (Pet. App. 27a). The court noted that although allegations of "substantial" or "appreciable" realty sales to out-of-state clients might establish the necessary effects on commerce, the allegation of "many" such sales would not (Pet. App. 28a & n.2). The court distinguished *Goldfarb*, holding (*id.* at 35a):

unlike the attorneys in *Goldfarb* whose participation in title insurance was statutorily mandated, real estate brokers are neither necessary nor integral participants in the "interstate aspects" of realty financing and insurance.

The court relied on *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), for the proposition that commercial activities that do not "inherently comprehend the interstate aspects of their business" are not covered by the Sherman Act (Pet. App. 37a).

SUMMARY OF ARGUMENT

The Sherman Act exercises all of the power Congress possesses over interstate commerce. That power is broad indeed. It reaches farmers who grow wheat to bake their own bread, because otherwise the farmers would buy wheat from elsewhere. It reaches the seating arrangements of small, family-owned restaurants, because they sometimes serve interstate travellers with food that comes from out of state. And it reaches the activities of real estate brokers.

Brokers solicit and serve customers moving from one state to another. They transact business with interstate referral services. They share commissions across state

borders. The product with which they deal is financed through an interstate lending market. The loans are guaranteed by the federal government. An increase in the price of commissions and the real estate itself will reverberate through these channels of interstate commerce. It will influence how many people move, how much they pay, who loans money (and how much), and how great a risk the United States assumes through its guarantees. And the commerce at issue is substantial—billions of dollars of federally-guaranteed loans, millions of state-to-state moves yearly, billions of dollars of funds supplied through interstate loans.

It may be that New Orleans brokers affect only a small part of this interstate commerce. But if interstate commerce is at stake in the industry as a whole, Congress possesses a commerce power over the entire industry. And because the Sherman Act expresses the entire commerce power, it applies to the activities of respondents.

At all events, petitioners should have been given an opportunity to prove at trial their allegations concerning the nature and extent of interstate commerce. An antitrust complaint should not be dismissed unless it is clear beyond doubt that the plaintiff cannot prove that the activities of the defendants affected interstate commerce. It is not possible to say that the jurisdictional allegations of the complaint are frivolous; in other cases, after trial, plaintiffs have proved to the satisfaction of judges and juries that conspiracies among real estate brokers affected interstate commerce.

ARGUMENT.

THE ACTIVITIES OF REAL ESTATE BROKERS ARE WITHIN THE COVERAGE OF THE SHERMAN ACT

A. THE SHERMAN ACT COVERS ALL ACTIVITIES WITHIN THE SCOPE OF THE COMMERCE POWER

The Sherman Act applies to all activities within Congress' power under the Commerce Clause. "Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed." *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 435 (1932). "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly arguments * * *." *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558 (1944). The Court has thus "permitted the reach of the Sherman Act to expand along with expanding notions of congressional power." *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 n.2 (1976).

Because the Sherman Act exercises all of the power Congress possesses, the court of appeals' holding that the statute does not apply to real estate brokers amounts to a holding that Congress has no power whatever to legislate with respect to the activities of brokers. The court of appeals acknowledged as much (Pet. App. 41a-42a). As we show below, however, the United States possesses legislative authority with respect to such activities.

B. BROKERAGE SERVICES ARE WITHIN THE SCOPE OF THE COMMERCE POWER

The Court frequently has held that "wholly local business restraints can produce the effects condemned by the Sherman Act." *United States v. Employing Plasterers Association*, 347 U.S. 186, 189 (1954). This is so because "even if * * * activity be local and * * * not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

The power Congress possesses under the Commerce Clause is substantial. It reaches the farmer who grows wheat and bakes his own bread, because even this wholly intrastate activity can affect interstate commerce. If the farmer did not grow his own wheat, he would buy bread in interstate commerce.³ It reaches every local loan made by loansharks, because loansharks compete with interstate lenders and provide money for interstate crime.⁴ It reaches regulation of the price of intrastate milk sales, because those sales affect the price of interstate sales.⁵ It reaches the local employment practices of employers whose goods later are shipped interstate.⁶ It reaches the

³*Wickard v. Filburn*, *supra*.

⁴*Perez v. United States*, 402 U.S. 146 (1971).

⁵*United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942).

⁶*United States v. Darby*, 312 U.S. 100 (1941). Cf. *United States v. Sullivan*, 332 U.S. 689 (1948) (commerce power allows Congress to prohibit relabeling of drugs after interstate shipment); *Scarborough v. United States*, 431 U.S. 563 (1977) (commerce power allows Congress to forbid felons to possess guns that ever have travelled interstate).

service of small family-owned restaurants and motels, because they may obtain food from out of state or serve interstate travellers.⁷ And once a class of endeavors is found to affect commerce, Congress can regulate all of the activities of that class, even activities that do not separately affect commerce.⁸ Consequently, it is not necessary to show, in order to invoke the commerce power, that a particular conspiracy has identifiable effects on interstate commerce. It is enough to show that the conspiracy takes place in an industry that affects commerce through its total activities.

The power of Congress reaches liquor wholesalers in Oklahoma who divide markets by territories and brands. It does so because territorial divisions reduce competition, because reduced competition leads to increased prices, and because increased prices lead to reduced sales, thus affecting the amount of commerce that crosses the borders of Oklahoma. *Burke v. Ford*, 389 U.S. 320, 322 (1967). The power of Congress extends to the intrastate fixing of attorneys' fees, because attorneys' services are related to the procuring of mortgage loans, and many mortgage loans are procured through interstate commerce. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-785 (1975). The power of Congress extends to attempts to monopolize intrastate provision of hospital services, because hospitals buy drugs through the channels of interstate commerce. *Hospital Building Co. v. Trustees of Rex Hospital*, *supra*.

⁷*Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

⁸*Perez v. United States*, *supra* (\$2,000 loan); *Wickard v. Filburn*, *supra*, 317 U.S. at 127-128 (one farmer's wheat).

The power of Congress likewise extends to the fixing of brokers' commissions and the manipulation of the price of real estate in and near New Orleans. Real estate brokers have substantial effects on the national economy. They earn approximately \$15 billion in commissions each year.⁹ The overwhelming majority of house sales take place through the auspices of brokers, and the costs of brokerage thus are felt in almost all sales.¹⁰ There are several large franchisors of real estate firms with affiliates in more than one state.¹¹ And because Americans are a mobile people, what brokers do affects the millions of people who move from one state to another and buy houses in the process.¹² The services of brokers are vital to these persons, because they have limited information concerning local markets. Brokers recognize this fact; they

⁹L. Minard, *Real Estate: Why George Babbitt Should be Smiling in his Grave*, FORBES 41 (Sept. 4, 1978).

¹⁰The National Association of Realtors (of which respondent Board is a part) has stated that "[f]or most people, the acquisition of real estate * * * requires professional assistance" by brokers. National Association of Realtors, *Supplemental Operations Manual* 1978 at 13. The need obviously is greatest for persons moving from state to state, for they have the least opportunity to learn about market conditions and offers to sell. They need a local agent familiar with the market.

¹¹See Minard, *supra*, at 42. On such firm, Century 21, has 6,039 affiliates in 48 states. Each affiliate pays a percentage of its revenues to a regional office, and each regional office in turn pays a percentage of its revenues to the home office.

¹²Between 1970 and 1975, approximately 8.6% of the population of the United States (and 11.5% of the population of the Southern states) moved from one state to another. Bureau of the Census, Current Population Reports, *Mobility of the Population of the United States March 1970 to March 1975* at 61 (Series P-20, No. 285, 1975). Another 7.2% (5.5% in Southern states) moved into the United States from abroad between 1970 and 1975. (This figure also includes persons whose 1970 residence is unknown to the Census Bureau.) These data mean that at least three million, and perhaps as many as six million, people move into a new state every year, and the data probably understate the amount of movement because some people moved more than once during the five-year period.

advertise in out-of-state media and participate in national relocation services.¹³ These services refer customers across state lines; commissions are divided across state lines. Several courts have held that these considerations subject brokers to the commerce power of the United States. *United States v. Foley*, Nos. 78-5013 to 78-5019 (4th Cir. Apr. 19, 1979), pets. for cert. pending, Nos. 78-1737 and 78-1838; *United States v. Harding*, 563 F. 2d 299, 302 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *United States v. Greater Syracuse Board of Realtors, Inc.*, 449 F. Supp. 887, 894-898 (N.D.N.Y. 1978).

But this is not all. The activities of brokers are intimately related to interstate commerce because much of the money that is used for mortgage loans crosses state lines, and additional sums are guaranteed by the United States.¹⁴ See *Goldfarb v. Virginia State Bar*, *supra*, 421 U.S. at 783. Cf. *Marquette National Bank v. First of Omaha Service Corp.*, No. 77-1265 (Dec. 18, 1978), slip op. 14-19. A conspiracy to increase commissions will increase the price of housing and thus will increase the amount of money borrowed. An increase in the amount

¹³See Minard, *supra*, at 42. The revenues of firms specializing in relocation services exceed \$125 million yearly.

¹⁴Mortgage loans are used to finance approximately 90% of all sales of housing. Department of Housing and Urban Development, *Tenth Annual Report on the National Housing Goal 89* (1979). The United States guarantees many of these loans through a variety of programs (see Pet. App. 22a n.4; *Goldfarb v. Virginia State Bar*, *supra*, 421 U.S. at 783). In 1977 the total mortgage debt on nonfarm homes for one to four families was some \$650.4 billion. Approximately \$141.7 billion of this was guaranteed by one or another federal agency. Department of Housing and Urban Development, *1977 Statistical Yearbook* 377. The United States also regulates the institutions that make the loans.

borrowed will affect the flow of commerce and also will increase the risk to which the United States is exposed through its guarantees. Moreover, if—as had been alleged here (Pet. App. 9a-11a)—the brokers also conspire to increase the price of the real estate itself, this agreement has an obvious and direct effect on borrowing. Some buyers will be priced out of the market; then the flow of commerce will be stopped. Other buyers will pay the higher prices; they will borrow more. Either way, interstate commerce is affected. The effect is even stronger when the buyers involved come from out of state.

Brokers do not simply stand by while financing is obtained.¹⁵ Brokers exist to provide information and services. They mediate sales; they do not sell the houses (the owners do that) but sell their services. They can compete to provide additional or better services and thus to make themselves attractive to buyers and sellers of houses. One of these services, which many brokers offer, is assistance in obtaining mortgage money and title insurance.¹⁶ See *United States v. Foley*, *supra*, slip op. 12-13; *United States v. Greater Syracuse Board of Realtors, Inc.*, *supra*, 449 F. Supp. at 895-896.¹⁷ It may be, as the

¹⁵Under the Commerce Clause, however, it makes no difference whether brokers participate in the financing, so long as their activities have an effect on the flow of commerce in that market. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Association*, 336 U.S. 460, 464 (1949).

¹⁶Title insurance often is obtained from out-of-state insurers.

¹⁷See also F. Case, *Real Estate Brokerage* 158 (1965). Some state laws define aid in obtaining financing as an aspect of the brokers' tasks. See e.g., Cal. Bus. & Prof. Code §§ 10131-10131.2 (West 1964).

court of appeals said, that brokers are not required to perform this service in order to earn their commissions (Pet. App. 35a)—although many contracts to buy are conditioned on the availability of financing, and brokers do not earn their commissions until all the conditions of a contract have been fulfilled (see Pet. App. 22a; Doc. No. 60, Exh. No. 1). But whether brokers must perform any particular service is not the question. That they do offer a service is the point, because their services as a whole affect interstate commerce.

In sum, real estate brokers solicit and serve customers who move from one state to another. They transact business with interstate referral services. They share commissions across state borders. The product with which they deal is financed through an interstate lending market. The financing is guaranteed by the federal government. The brokers take an active role in obtaining financing. And the commerce they affect is substantial—billions of dollars of federally-guaranteed loans, millions of state-to-state moves yearly, billions of dollars of loan funds supplied by out-of-state lenders. Under any test, a substantial amount of interstate commerce is affected.¹⁸ Congress thus has the power, under the Commerce Clause, to regulate the affairs of real estate brokers. And because the Sherman Act expresses all the power Congress possesses, it applies to the market in realty services.

¹⁸A loan of \$200,000 is "not insubstantial" for purposes of antitrust analysis. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501-502 (1969).

C. THE ALLEGATIONS OF THE COMPLAINT
IN THIS CASE WERE SUFFICIENT TO ENTITLE
THE PLAINTIFFS TO A TRIAL ON THE
QUESTION WHETHER BROKERAGE SERVICES
AFFECT COMMERCE

If the Court agrees with the approach we have used above, the question whether petitioners can prove at trial (or on a motion for summary judgment) that the New Orleans brokers affected commerce in a particular fashion is irrelevant. The effect on commerce can be found in the nature of the business, just as the Court found effects on commerce in the nature of the liquor business in *Burke v. Ford*, *supra*. The question whether the Commerce Clause gives Congress power to legislate with respect to a particular industry ordinarily should not be the subject of a trial. If it were, the scope of constitutional power might depend on the ingenuity of counsel or the credibility of witnesses. It is unlikely that Congress has the power to regulate brokers in Syracuse but not in New Orleans, with the difference depending on whether the plaintiffs made the right offer of proof. Cf. *Vance v. Bradley*, No. 77-1254 (Feb. 22, 1979), slip op. 17-18.

Even if the extent of power under the Commerce Clause turns on what the plaintiffs are able to prove in a particular case about the nature of the business, petitioners satisfied their obligation here. They alleged that many out-of-state buyers use respondents' services (one petitioner moved into Louisiana from out of state using respondents' services, see R. 121) and that respondents assist their clients in obtaining financing and title insurance, much of which comes from out of state (Pet. App. 9a). They contended that respondents belong to interstate relocation services (R. 163); they discovered that respondents paid fees for out-of-state referrals (Doc. No. 60 at 32) advertised the nationwide reach of their

services (Doc. No. 61 at 60-61), and divided commissions with out-of-state brokers (Doc. No. 61 at 32). In holding that proof of these allegations would be insufficient as a matter of law, the courts in this case erred. A conspiracy that increases the fees and the price of the real estate will affect the number of purchasers and the amount and type of interstate activity. See *United States v. Foley, supra*; *United States v. Greater Syracuse Board of Realtors, Inc., supra*, 449 F. Supp. at 895; *Mortensen v. First Federal Savings & Loan Association*, 549 F. 2d 884 (3d Cir. 1977). It also will affect the interstate divisions of commissions.

The district court restricted "further discovery" to the question whether the brokers assist in obtaining financing and title insurance (Pet. App. 18a-19a). This precluded any reliance on the use of services by out-of-state customers (see *id.* at 18a n.2) and on the inevitable effects of changes in price on the amount of interstate commerce (see pages 10-11, *supra*).¹⁹ But even on the lower courts' view of what was required to show an effect on interstate commerce, they erred in dismissing the case.

The district court and the court of appeals essentially looked to state law and practice to determine whether the services of brokers are *necessary* to the process of obtaining loans and title insurance. This, they said, was appropriate under the approach of *Goldfarb v. Virginia State Bar, supra*, which found that the fixing of attorneys' fees has an effect on commerce because attorneys' services are necessary to the obtaining of mortgage loans and title insurance. But the Court did not hold in *Goldfarb* that the

¹⁹For example, petitioners tried to determine whether respondents engaged in out-of-state advertising (R. 352). Respondents objected to the interrogatory asking for this information and did not answer it (R. 411-413). The district court dismissed the action without compelling respondents to answer.

proof of the necessary relationship between attorneys' services and loans is the only way to show an effect on commerce. It held, instead, that proof of such a relationship is a sufficient way to show an effect on commerce. The Court did not exclude the possibility that the existence of effects on interstate commerce could be demonstrated in other ways.

The approach used by the courts in this case overlooks the nature of the analysis used in *Burke, Goldfarb, Hospital Building*, and similar cases. A conspiracy to fix commission rates and the prices of the houses themselves could substantially increase the cost to the buyers, thus affecting the amount of interstate movement and the amount of interstate financing "as a matter of practical economics." *Hospital Building Co. v. Trustees of Rex Hospital, supra*, 425 U.S. at 745 (footnote omitted). No economic theory predicts that an increase in cost leaves the quantity supplied unaffected. Cf. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, No. 77-1578 (Apr. 17, 1979), slip op. 17. And even if the effect of an increase in price were not obvious,²⁰ a court should not dismiss the complaint. As the Court held in *Hospital Building Co. v. Trustees of Rex Hospital, supra*, 425 U.S. at 746-747, the court should allow the plaintiff an opportunity to prove his allegations at trial. As is true in other parts of the law, a court should not dismiss an antitrust case for want of subject matter jurisdiction unless the jurisdictional allegations are frivolous.²¹ It is not possible to characterize as frivolous petitioners' allegation that the activities of the brokers affect commerce.

²⁰*Burke v. Ford, supra*, appears to hold that a court may take judicial notice that an increase in price leads to reduced purchases.

²¹See *Bell v. Hood*, 327 U.S. 678, 682-683 (1946); 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3564 (1975).

The court of appeals' apparent belief (Pet. App. 34a-37a) that the complaint is insufficient because the effects on commerce of brokers' activities are "incidental" rather than "direct" also is inadequate to support its decision. The court of appeals relied in this regard on *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). But *Yellow Cab* was decided at a time when the Court examined a case to determine whether the alleged restraint took place "in commerce." Not until *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), did the Court hold that the Sherman Act also prohibits restraints "affecting commerce." Whatever role the incidental-direct dichotomy may play in determining whether something occurs "in" commerce, it plays no role at all in determining whether activities "affect" commerce. See *Wickard v. Filburn*, *supra*; *Perez v. United States*, 402 U.S. 146 (1971). The approach of *Yellow Cab*, if still vital,²² thus is irrelevant here, because the restraint of trade in brokerage services is alleged to "affect" interstate commerce.

²²The Court construed *Yellow Cab* narrowly in *Goldfarb* (see 421 U.S. at 748 n.13). Then it stated in *Hospital Building Co.* that the indirect nature of an effect "does not lead to a conclusion that the conduct at issue is outside the scope of the Sherman Act" (425 U.S. at 744). See also I P. Areeda & D. Turner, *Antitrust Law* para. 232d (1978).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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